



Tax Flash News

16 February 2024

The US company does not have a permanent establishment in India for providing airline ticket booking services through its computer reservation system located outside India

Executive Summary

In a recent decision¹, the Delhi bench of the Tribunal held that the taxpayer does not have a fixed place permanent establishment (PE) in India for providing airline ticket booking through its computer reservation system (CRS) under the India-US tax treaty (the treaty). Access to the CRS located in the USA was provided to the foreign travel agencies and not directly to the Indian travel agents. The taxpayer has not provided any equipment to the Indian travel agents at their premises in India.

The US company also does not have an agency PE in India in the absence of any entity habitually procuring contracts for the taxpayer or binding the taxpayer for the contracts to be entered by that entity independently.

Facts of the case

- The taxpayer (a resident of the USA) entered into an agreement with the airlines to provide services of facilitating the booking of airline tickets through its CRS located in the USA².
- The taxpayer, in turn, entered into agreements with the foreign travel agencies for accessing the CRS.
- For the year under consideration, the taxpayer had no office/place of business in India or any employees in India. It availed marketing support from the branch office of its group company in India.
- The taxpayer claimed that it did not have a PE in India and its business income was not taxable in India as per the treaty.
- The tax officer, relying on the decision in *Galileo International Inc*³ and following the taxpayer's own case for the earlier years, held that the taxpayer had a PE in India.
- The taxpayer argued that its facts for the years under consideration were materially different from those in the earlier years, as summarised below:

Facts in the earlier years	Facts in the years under consideration
<p>The taxpayer entered into a marketing and distribution agreement with an Indian joint venture (the JV).</p> <p>The JV in turn entered into subscriber agreements with various Indian travel agents to provide them with access to the CRS, including equipment, communication link and support services.</p>	<p>The taxpayer entered into subscriber agreements outside India with the foreign travel agencies (global subscribers) which had a presence or affiliates in multiple countries including India.</p> <p>Such travel agencies were allowed to access the CRS. The CRS access was not directly given to Indian travel agents.</p>

¹ ITA No. 216/Del/2016 - Source: Taxsutra

² The taxpayer was also provided hotel booking services

³ DIT v. *Galileo International Inc.* [2009] 336 ITR 264 (Del)

The JV installed computers, printers, etc. at the travel agent's premises in India and the ownership of such equipments remained with the JV.	The taxpayer was not responsible for providing any computers, printers, communication lines, etc. to the global subscribers or their affiliates in India.
The taxpayer earned booking fees from airlines. It remunerated the JV for providing distribution and marketing services at a fixed per cent of the booking fees. Further, the cost of computers and printers, etc. installed by the JV at the premises of the agent was also partially reimbursed by the taxpayer to the JV.	The taxpayer earned booking fees from the participating airlines when the travel reservations were made using the taxpayer's CRS. It, in turn, pays an incentive fee to the global subscribers for each booking their agents make in the system. There is no direct payment by the taxpayer to the Indian affiliates of the global subscriber.

- The Revenue argued that the taxpayer had a PE in India on the following grounds:
 - The CRS gateway was nothing but a business vehicle. In virtual businesses, such a gateway and its usage permission would constitute a fixed place as revenue accrues out of it, and the interests and stakes reside there.
 - Though the travel agents were not exclusive to the taxpayer, the gateway of the taxpayer once accessed makes them the agents of the taxpayer resulting in an agency PE in India.
 - The business model of the taxpayer had undergone some specific changes. However, it was not tenable when the whole picture was considered. Accordingly, following the prior period's conclusions was not incorrect.
- The taxpayer distinguished the decision in the *Galileo* case on the ground that in that case, the subscribers who were enrolled for providing services to airlines through CRS were situated in India. The computers as well as the connectivity and configuration of the computers were provided by the taxpayer.
- The taxpayer relied on the Tribunal decision in *Western Union Financial Services*⁴ to argue that software installed in India granting access to the taxpayer's mainframe located outside India will not constitute a PE in India.

Tribunal decision

Fixed Place PE

- The Tribunal distinguished the decision in the *Galileo* case based on the facts of the case. In that case, the taxpayer through its intermediary was exercising complete control over the computers installed at the premises of the travel agents. The communication link was provided by the intermediaries.
- In the instant case, the access to CRS was no longer directly distributed to the Indian travel agents. Instead, the taxpayer entered into subscriber agreements with foreign travel agencies in countries outside India.
- There was no arrangement to provide or finance any computer or printer at the premises of a travel agent in India.
- The agents were allowed to access the CRS mainframe located in the US through nodes and networks that were independently sourced by them on their own. The taxpayer had not insisted, assisted, provided, or facilitated in providing a communication link.
- Thus, the taxpayer did not have a fixed place PE in India.
- A very routine approach was adopted by the Revenue by holding that the gateway was a business vehicle. The revenue did not see if the gateway was functional for some auxiliary purposes for the work performed by the alleged PE.

Agency PE

- In the *Galileo* case, the distributor was held to be wholly dependent upon the taxpayer for the CRS business. It was the exclusive distributor of CRS services for the Indian market. The distributor had the authority to enter into a subscriber agreement with the Indian travel agents to provide access to the CRS. The authority to bind the taxpayer gave the distributor the status of an agent.
- However, in the instant case, the taxpayer did not have an intermediary (in the form of the JV or distributor like in the *Galileo's* case), and thus there was no question of existence of the agency PE.

⁴ *Western Union Financial Services Inc. v. ADIT* (2007) 104 ITD 34 (Del)

- The foreign travel agencies were not exclusive to the taxpayer. The taxpayer and the foreign travel agencies were unrelated entities acting in their ordinary course of business.
- There was no entity habitually procuring contracts for the taxpayer or binding the taxpayer for the contracts to be entered by that entity independently.
- Thus, the taxpayer did not have an agency PE in India.

Our comments

The determination of a PE in virtual business has been a complex issue. The Tribunal in this case dealt with the issue of determination of a PE in the case of ticket booking services provided through the CRS. Based on the facts of the case, the Tribunal distinguished the decision in the *Galileo* case and the taxpayer's own case for the earlier years. The decision may have application to other players in the same industry or following a similar business model.

KPMG in India addresses:

Ahmedabad

Commerce House V, 9th Floor,
902, Near Vodafone House, Corporate Road,
Prahlad Nagar,
Ahmedabad – 380 051.
Tel: +91 79 4040 2200

Bengaluru

Embassy Golf Links Business Park,
Pebble Beach, 'B' Block,
1st & 2nd Floor,
Off Intermediate Ring Road, Bengaluru – 560071
Tel: +91 80 6833 5000

Chandigarh

SCO 22-23 (1st Floor),
Sector 8C, Madhya Marg,
Chandigarh – 160 009.
Tel: +91 172 664 4000

Chennai

KRM Towers, Ground Floor,
1, 2 & 3 Floor, Harrington Road,
Chetpet, Chennai – 600 031.
Tel: +91 44 3914 5000

Gurugram

Building No.10, 8th Floor,
DLF Cyber City, Phase II,
Gurugram, Haryana – 122 002.
Tel: +91 124 307 4000

Hyderabad

Salarpuria Knowledge City,
6th Floor, Unit 3, Phase III,
Sy No. 83/1, Plot No 2, Serilingampally
Mandal,
Ranga Reddy District,
Hyderabad – 500 081.
Tel: +91 40 6111 6000

Jaipur

Regus Radiant Centre Pvt Ltd.,
Level 6, Jaipur Centre Mall,
B2 By pass Tonk Road,
Jaipur – 302 018.
Tel: +91 141 - 7103224

Kochi

Syama Business Centre,
3rd Floor, NH By Pass Road,
Vytila, Kochi – 682 019.
Tel: +91 484 302 5600

Kolkata

Unit No. 604,
6th Floor, Tower – 1,
Godrej Waterside,
Sector – V, Salt Lake,
Kolkata – 700 091.
Tel: +91 33 4403 4000

Mumbai

2nd Floor, Block T2 (B Wing),
Lodha Excelus, Apollo Mills Compound, N M
Joshi Marg, Mahalaxmi, Mumbai- 400011
Tel: +91 22 3989 6000

Noida

Unit No. 501, 5th Floor,
Advant Navis Business Park,
Tower-A, Plot# 7, Sector 142,
Expressway Noida,
Gautam Budh Nagar,
Noida – 201 305.
Tel: +91 0120 386 8000

Pune

9th floor, Business Plaza,
Westin Hotel Campus, 36/3-B,
Koregaon Park Annex,
Mundhwa Road, Ghorpadi,
Pune – 411 001.
Tel: +91 20 6747 7000

Vadodara

Ocean Building, 303, 3rd Floor,
Beside Center Square Mall,
Opp. Vadodara Central Mall,
Dr. Vikram Sarabhai Marg,
Vadodara – 390 023.
Tel: +91 265 619 4200

Vijayawada

Door No. 54-15-18E,
Sai Odyssey,
Gurunanak Nagar Road, NH 5,
Opp. Executive Club, Vijayawada,
Krishna District,
Andhra Pradesh – 520 008.
Tel: +91 0866 669 1000

kpmg.com/in

Follow us on:

kpmg.com/in/socialmedia



The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

KPMG Assurance and Consulting Services LLP, Lodha Excelus, Apollo Mills Compound, NM Joshi Marg, Mahalaxmi, Mumbai - 400 011 Phone: +91 22 3989 6000, Fax: +91 22 3983 6000

© 2024 KPMG Assurance and Consulting Services LLP, an Indian Limited Liability Partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved.

The KPMG name and logo are trademarks used under license by the independent member firms of the KPMG global organization.

This document is meant for e-communication only.